IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

ARBITRATION PETITION NO.466 OF 2002

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Voltas Limited ...Petitioners

v/s.

General Engineering Works
and others. ....Respondents

...

Mr.Gaurav Joshi and Mr.M. Uttam i/b Mulla & Mulla C.B.C. for the Petitioners.

Mr.Suresh Gupte i/b Mr.V.L. Panjwani for Respondent No.1.

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**CORAM: D.K.DESHMUKH, J.**

**DATED: 2ND SEPTEMBER,2004**

**P.C.:**

1. The Petitioner by this petition filed under Section 34 of the Arbitration & Conciliation Act challenges the award passed by the arbitral tribunal dated 24-5-2002. It appears that the Petitioner was awarded a turnkey project by the Bihar State Electricity Board for supply, erection, testing and commissioning of certain Electrostatic Precipitators (ESP) (Air Pollution Controlling Equipment) for the Baurani Thermal Power Station. The work order dated 25-6-1990 and 11-8-1990 was placed by the Petitioner on the Respondent No.1 on the terms and conditions set out therein. In short, the Petitioner had given labour contract to the Respondent No.1. For that purpose an agreement was entered into between the parties. Admittedly, in that agreement there was an arbitration clause. As disputes arose between the parties, those disputes were referred to the arbitral tribunal. The arbitral tribunal has made the award. Admittedly, both the parties have not led any oral evidence. The award has been made on the basis of the documentary evidence produced by the parties.

2. Before me, on behalf of the Petitioner serious challenge is raised to the amount awarded by the arbitral tribunal against claims Nos. 3, 4, 5 and 6. The learned Counsel appearing for the Petitioner submits that the award made by the arbitral tribunal is liable to be set aside , because that award has been made without considering material and relevant documents on record. The learned Counsel submits that on 28-2-1993 a letter was written by the Respondent No.1 to the Petitioner stating therein that one of the officers of the Respondent No.1 was summoned by one of the notorious local gang along with resident Manager of the Petitioner and 10% cash of the total value of work completed was demanded. It was stated in the face of such demand and threats, continuation of the further work is difficult. Next day i.e. 1-3-1993, a letter was addressed on behalf of the Respondent No.1 to the Petitioner that their workers are pressing for providing medical leave, that none of the workers are working at the site and therefore, in this circumstance the Respondent No.1 is forced to close down the site. The Petitioner by letter dated 2-3-1993 addressed to the Bihar State

Electricity Board informed that as the Respondent/ sub-contractor has closed the site, the Petitioner also can not continue and the Petitioner also closed the site. The learned Counsel submits that the Arbitral Tribunal has held that the Petitioner unilaterally closed the site, but the arbitral tribunal does not even refer to this correspondence which was produced on record. According to the learned Counsel, therefore, the finding recorded by the arbitral tribunal that it is the Petitioner which is responsible for the abandoning of the work prematurely is liable to be set aside. The learned Counsel in so far as claim No.3 is concerned, which in two parts, first part relates to claim of Rs.3,12,848/-, in relation to bills submitted by the Respondent No.1, but the payment not made by the Petitioner, submits that the Respondent No.1 was not in a position to produce the original bills and therefore in the absence of original bills, the arbitral tribunal was not justified in awarding this claim. So far as the second part of Claim No.3 is concerned, the learned Counsel submits that the amount of Rs.90,360/- awarded by the learned Arbitrator for the period during which the crane was

not available to the Respondent No.1 is unjustified and this award has been made without looking into the relevant clauses of the contract. The learned Counsel submits that as per the contract an obligation on the Petitioner was to make a crane available to the Respondent No.1, in case it is made available by the Bihar State Electricity Board.

3. So far as claim No.4 is concerned, which relates to the price of machines and tools left behind by the Respondent No.1 on site is concerned, the learned Counsel submits that there is no clause in the contract which obliges the Petitioner to make the payment for these items. He further submits that the site was abandoned by the Respondent No.1 firstly and they have not led any evidence to show that at the time of abandonment of the site it was not possible for the Respondent No.1 to remove their machines and tools.

4. The learned Counsel, so far as, Claim No.5 is concerned, which relates to payment of retrenchment compensation submits that this award is also contrary to the terms in the contract which obliges the

Respondent No.1 to pay all statutory dues to the labour.

5. So far as claim No.6 is concerned, which is for loss of profit. The learned Counsel submits that the amount has been awarded by holding that the Petitioner has abandoned the work. The learned Counsel submits that if the arbitral tribunal is not right in holding that the abandonment of the work is first by the Petitioner, then there is no justification in making any award on account of loss of profit in favour of Respondent No.1.

6. The learned Counsel appearing for the Respondent No.1, on the other hand submits that though it is true that by letter dated 1-2-1993 the Respondent closed the site, but it was not the permanent closure. The Respondent No.1, thereafter, made efforts to revive the site and to restart the work, but due to Petitioner’s lack of efforts, the work could not be restarted. The learned Counsel submits that therefore the arbitral tribunal has rightly held that the Petitioner is responsible for premature abandonment of the work. So far as claim No.3 is

concerned, the learned Counsel submits that so far as the first part of the claim against which the amount of about Rs.97,000/- has been allowed by the learned Arbitrator, the work had already been completed by the Respondent No.1. Bills were also submitted. But payment was not made because copies of the bills were not available. The learned Counsel submits that the fact remains that the bills were submitted and they related to the work that was already done. The learned Counsel submits that therefore the finding recorded by the arbitral tribunal on this count cannot be disturbed. So far as second part of the claim is concerned, namely payment for the period during which crane was not made available is concerned, the learned Counsel submits that the crane was available, but it was under repairs. The Petitioner did not get the crane repaired and in the hope that the crane will be made available, the labour force was engaged by the Petitioner and therefore the Petitioner is liable to pay for the labour engaged during that period. In the submission of the learned counsel, therefore, there is no justification to disturb the finding recorded by the learned arbitrator on that count. So far claim No.4

is concerned, the learned Counsel submits that the arbitral tribunal has held that it is the petitioner who is responsible for premature abondonment of the work and therefore, it is the Petitioner who will have to pay the price of the machineries and other dues which had to be left behind by the Respondent on the site. So far as Claim No.5 is concerned, which is retrenchment compensation, the learned Counsel submits that because efforts were going on for reviving the work, workers were required to be paid the retrenchment compensation and therefore it is rightly held by the arbitral tribunal that the Petitioner is liable to pay the same. So far as claim No.6 is concerned, the learned Counsel submits that the arbitral tribunal has rightly held that it is the Petitioner who is responsible for the abandonment of the work.

7. Now, in the light of these rival submissions if the record is perused, it becomes clear that in paragraph 21 of the award the arbitral tribunal has recorded thus:

21. The problem faced from the threat to Claimants' life by local miscreants was recorded in various communications of the Claimants including letter dated 22-1-1992. At that stage, the main problem faced by the Claimants was extortion by the local miscreants who were threatening the lives of the Claimants' staff and labour. There was a strike by BTPS workers paralyzing the Claimants erection work, as the claimants labourers were not permitted to enter the site. Though the Claimants suffered losses for the period of the strike, the Claimants did not demobilize their labour in the hope that the strike would be called off soon. Ultimately a notorious gang summoned the Respondents Resident Manager on 25.2.1993 along with the Claimants' site representative. The miscreants made unreasonable demands on the Respondents and otherwise directed the Respondents to leave the site immediately. Under threat of danger to the Respondents' lives, the

> Respondents' Resident Engineer immediately left Barauni on 28-2-1993 and did not return again. In the absence of the Respondents representative at site, the Claimants were not in a position to carry out any further work. The Respondents addressed letter dated 2-3-1993 to the BTPS informing that the Respondents could not continue with the work any more and were forced to close the site.

8. The arbitral tribunal has referred to the letter dated 28-2-1993 from the Respondent No.1 to the Petitioner. It has also referred to the letter dated 2-3-1993 from the Petitioner to Bihar Electricity Board. But it has omitted to refer to the letter dated 1-3-1993. Relevant portion of the letter dated 28-2-1993 reads as under:-

> This is to inform you that the undersigned was summoned by one of the notorious local gang about 9 p.m. on 25th February, 1993

along with your resident Manager. The party was demanding 10% cash of the total value of work completed by us as on date and we had been asked to quit the balance work of 2 ESP’s.

As you are kindly aware that we already running in heavy loses and somehow we are managing the work by taking local loans and huge outstandings with our suppliers. Moreover such type of demands we can not afford to consider and under the above circumstances continuation of further work also is difficult. This is for your necessary information and action please.

Perusal of this letter from the Respondent No.1 makes it clear that due to threats and demand from the notorious local gangs the Respondent No.1 was finding it difficult to continue the work. The next letter admittedly is dated 1-3-1993. That letter reads as under:-

> In spite of several discussions with you, we observed that all workers are still pressing us to provide medical leave which has already been desired by us from time and again.
>
> To-day we observed that no body is working at site due to the same- and which is totally illegally.
>
> Under the above conditions we are forced to close the site and "no work no pay" will be strictly observed.

Perusal of these letters shows that in no uncertain terms the Respondent No.1 informed the Petitioner that they are forced to close the site and that "no work no payment" will be strictly observed. As the labour contractor closed the site the Petitioner wrote a letter to the authorities of Baurauni Thermal Power Station dated 2-3-1993. That letter reads as under:-

> Please find enclosed a letter from our erection sub-contractor and which is self explanatory and we are constrained to inform your goodself that we can not continue the work anymore and forced to close the site.

Reading of these three letters shows that as on 1-3-1993 the Respondent closed the site the Petitioner was left with no alternative but to close the site. In paragraph 24 the arbitral tribunal recorded thus:

> The Claimants contention was that if the Respondents contention that the Claimants had abandoned the site was true, it was always open to the Respondents to terminate the Claimants contract and to carry out the balance work at site. The records indicate that the Respondents never terminated the Claimants' contract nor did the Respondents

take any steps for execution of the balance work, thereafter through any other agency. Thus it is clearly evident from the records that the Respondents abandoned the site and consequent to their abandonment, the Claimants were not in a position to continue any further work, in the absence of the representatives of the Respondents at site. The records indicate the gravity of the problems faced by both the parties at the site, resulting in the work going into a stalemate. After the Respondents' Resident Engineer left the site on 28-2-1993, the correspondence indicate that the Respondents were trying to recommence the activities. However the records also indicate that no such activities related to the contract work were ever recommenced by the Respondents at the site. According to the Claimants the Claimants continued to be at site even after 28-2-1993 awaiting the Respondents communication for re-commencement of the activities. This is evident from the Claimants having continued

> to make payments to their labour/staff for the period from 12-4-1993 to July 1993, based on payment transfer vouchers issued by the Claimants' Bankers.

Perusal of the above quoted observations clearly shows non-application of mind on the part of the arbitral tribunal. The arbitral tribunal by referring to the letter dated 28-2-1993 quoted above observed that that letter shows that the Respondent was trying to recommence the activities. The arbitral tribunal also observes that the Respondent was awaiting communication from the Petitioner for recommencement of the activities. But the arbitral tribunal has totally ignored that the Respondent itself in no uncertain terms by letter dated 1-3-1993 informed the Petitioner that they have closed the site and there is nothing in the letter dated 1-3-1993 about any revival. In my opinion, therefore, the finding of the arbitral tribunal that the abandonment of the work was only by the Petitioner and that the Petitioner is solely responsible for that suffers from non-application of

mind to the most relevant material on record.

9. Now, so far as Claim No.3 is concerned, as observed above it is in two parts. In relation to first part an amount of Rs.97,000/- has been awarded. That claim appears to be for the work which was already done by the Respondent, for which bills were submitted. But when the demand was made the bills were not available with the Respondent to reinforce its claim. The arbitral tribunal has recorded a finding that bills were duly served on the Petitioner and by referring to the statement of payment of the Petitioner the arbitral tribunal has recorded a finding that the Petitioner has not made payment for that work. I find that this is a finding of fact recorded by the arbitral tribunal. There appears to be some material on record for supporting this finding and therefore, it will not be appropriate on the part of this Court to disturb that finding. But the same cannot be said about the other part of the claim namely the award of Rs.90,360/- for the wages of the labour for the period during which they were sitting ideal due to non-availability of the crane. Perusal of the

contract between the parties shows that in the contract there is a clear stipulation "You will not claim any idling charges during 36 months period". There is a further provision in the contract which reads as under:-

> For erection work, loading & unloading work at site, crane facility will be given to free of cost as and when available from BSES; otherwise the works will be carried out with the derricks and there will be no extra charges to Voltas.

There can be no denial that these two terms in the contract were relevant for considering second part of claim No.3. The arbitral tribunal, however, ignored both these terms in the contract and has awarded an amount of Rs.90,360/-. Perusal of the award shows that without referring to the relevant clauses an amount of Rs.90,360/- is directed to be paid only to mitigate the loss of the Respondent. In my opinion, award of Rs.90,360/- against Claim

No.3 is clearly contrary to the terms in the contract and therefore it has to be set aside.

10. So far as Claims Nos.4 and 6 are concerned, in my opinion, Claims Nos. 4 and 6 are relating to loss of profit , therefore, they are to be taken together. Claim No.4 relates to the price of the material, machines and tools that were left behind by the Respondent No.1 at the time of abandonment and Claim No.6 relates to loss of profit due to abandonment. I have already held above that it was the Respondent No.1 who has abandoned the work first which is obvious from the letter dated 1-3-1993 and because of the abandonment of the work by the Respondent No.1 the Petitioner had to follow the suit. Therefore, as it is the Respondent No.1 who abandoned the work it was for him to take away any machines, tools etc. lying on the spot. There is also no term in the contract which makes the Petitioner liable to pay the price of machines, tools etc. left behind by the Respondent No.1. In the face of the finding that it is the Respondent No.1 who abandoned the work, there is no scope for granting any amount on account of loss of profit.

Therefore, award made in relation to claims Nos. 4 & 6 is liable to be set aside. It is accordingly set aside.

11. The next item is amount of Claim No.5. Under this head the arbitral tribunal has directed the Petitioner to pay the amount of Rs.1,61,181/- to the Respondent No.1. The arbitral tribunal in awarding this claim has ignored the most relevant term in the contract. This claim relates to retrenchment compensation which the Respondent No.1 was required to pay to his labour force due to premature abandonment of the work. Provisions of the contract relevant in this regard reads as under:-

> You shall ensure compliance with all the statutory rules, laws, regulations of Central Govt. Bihar State Govt., and particularly the provisions under Contract labour, workmen's compensation act, payment of wages act, minimum wages act, employees' provident fund act, ESI, etc. The payment of any sort shall be entirely your responsibility. In case you fail to comply

> with the above and wherever your financial commitments are involved, we reserve the right to deduct the same from the amounts payable to you against your bills.

It goes without saying that retrenchment compensation is liability cast on the employer by the labour legislation and under the clause quoted above, it was the responsibility of the Respondent No.1 to make payment of retrenchment compensation. The arbitral tribunal, however, without referring to this provision in the contract has directed the Petitioner to make the payment. In my opinion, as the award has been made by the arbitral tribunal without considering the relevant provisions in the contract, the award made against claim No.5 is liable to be set aside.

12. In the result, therefore, petition succeeds in part and is allowed. The award made by the arbitral tribunal directing payment of an amount Rs.90,360/- against Claim No.3, the amount awarded against

claims Nos. 4, 5 & 6 are set aside. Rest of the award is confirmed.

Petition disposed of. No order as to costs.

There shall be decree of the court in terms of the award modified by this order.

Parties to act on ordinary copy of the order duly authenticated by the Associate/ Personal Secretary of the Court as a true copy.

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